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No. 97-704

FILED

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PHILOMENA DOOLEY, ET AL.,

Petitioners,

—v.—

KOREAN AIR LINES CO., LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM OF RESPONDENT IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether, in light of *Zicherman v. Korean Air Lines*, 116 S. Ct. 629 (1996) and *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), the pecuniary damage standard of the Death on the High Seas Act, 46 U.S.C. App. § 761 *et seq.*, may be supplemented with nonpecuniary damages for pre-death pain and suffering on the basis of general maritime law?

RULE 29.6 LISTING

Respondent KOREAN AIR LINES CO., LTD. ("KAL") is a Korean corporation engaged in the business of international transportation by air of passengers, baggage and cargo. KAL is a member of The Hanjin Group of Korea, which comprises companies under common management direction. KAL's investments in securities and/or affiliated companies consist of the following:

Air Cargo Terminal Co., Ltd.
Air Korea Co., Ltd.
Daehan Oil Pipeline Corporation
Government Bonds
Hana Bank
Hanil Bank
Hanjin Construction Co., Ltd.
Hanjin Data Communication
Hanjin Heavy Industry Co., Ltd.
Hanjin International Corp.
Hanjin Int'l Japan Co., Ltd.
Hanjin Investment Securities Co., Ltd.
Hanjin Shipping Co., Ltd.
Hyundai Oil Refinery Co., Ltd.
Korea Air Terminal Service Co., Ltd.
Korea Freight Transportation Co., Ltd.
Korea Investment Corporation
Korean French Banking Corporation
Korea Technology Development Co., Ltd.
Kyungki Bank, Ltd
Peace Bank of Korea
Terminal One Management Inc.
The Company Fund
The Korea Economic Daily

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Treaties and Statutes:

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OPINIONS BELOW

The Petition for Writ of Certiorari ("Petition") does not make reference to the following relevant decisions of the district court below: *In re Korean Air Lines Disaster of Sept. 1, 1983*, 935 F. Supp. 10 (D.D.C. 1996) and *In re Korean Air Lines Disaster of Sept. 1, 1983*, Nos. 83-2793 *et al.* (D.D.C. Apr. 8, 1993) (not officially reported). These decisions are reproduced in the Appendix hereto at RA 1a and RA 14a, respectively. References preceded by "RA" refer to pages in the Appendix hereto. References preceded by "A" refer to pages in the Appendix to the Petition.

JURISDICTION

Respondent KOREAN AIR LINES CO., LTD. ("KAL") agrees with the jurisdictional statement set forth in the Petition, except that jurisdiction in the district court also existed pursuant to 28 U.S.C. § 1333, Original Admiralty and Maritime Jurisdiction.

STATUTORY AND TREATY PROVISIONS INVOLVED

These actions are governed exclusively by the Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. § 761 *et seq.* and the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934) (reprinted in note following 49 U.S.C. § 40105) ("Warsaw Convention"). The pertinent provisions are set forth in the Appendix to the Petition at A 21a-23a.

STATEMENT OF THE CASE

KAL supplements the statement of the case in the Petition to set forth fully the disposition of the cases in the district court and in the Court of Appeals below.

A. Nature of the Case

The case at this stage involves only the legal question whether nonpecuniary damages for pre-death pain and suffering are recoverable for the deaths of five passengers on KAL flight KE007, who were killed when the aircraft was shot down by Soviet military aircraft on September 1, 1983. The deaths of the decedents occurred on the high seas, within the meaning of DOHSA, during the course of international transportation by air, within the meaning of the Warsaw Convention. The Petitioners are the personal representatives of the estates of the deceased passengers, who seek pecuniary

and nonpecuniary damages individually and on behalf of the estates and various surviving relatives of the decedents.

B. Disposition Below

1. The Pre-*Zicherman* Rulings of the District Court

In 1993, following the conclusion of the multidistrict liability proceedings[1], KAL moved in these and other cases, pending in the district court and awaiting damage trials, for a determination, *inter alia*, that the types of recoverable damages are governed exclusively by DOHSA and that Petitioners, therefore, were not entitled to recover any nonpecuniary damages for loss of society, survivor's grief and pre-death pain and suffering. 46 U.S.C. App. § 762 (A 22a). By Memorandum Opinion and Order, filed April 8, 1993, the district court denied KAL's pre-trial motion. *In re Korean Air Lines Disaster of Sept. 1, 1983*, Nos. 83-2793 *et al.* (D.D.C. Apr. 8, 1993) (RA 14a). The district court found that, although both DOHSA and the Warsaw Convention apply to these actions, DOHSA was not the exclusive remedy as to recoverable damages. *Id.* at RA 15a. The district court allowed Petitioners to pursue the recovery of nonpecuniary damages for loss of society, survivor's grief and pre-death pain and suffering. *Id.*[2] The

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[1] The liability of KAL was determined in the context of multidistrict litigation proceedings in the district court below. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991).

[2] The district court, in four other actions that were tried, subsequently held that nonpecuniary damages for survivor's grief are not recoverable under the Warsaw Convention as a matter of law. *See Forman v. Korean Air Lines*, No. 83-3578 (D.D.C. June 6, 1995) (Memorandum Opinion and Order), *aff'd and rev'd in part*, 84 F.3d 446 (D.C. Cir. 1996), *cert. denied*, 117 S. Ct. 582 (1996); *Oldham v. Korean Air Lines*, 1994 WL 725277 (D.D.C. Oct. 11, 1994), *aff'd and rev'd in part*, ___ F.3d ___, 1997 WL 582898 (D.C. Cir. Sept. 23, 1997); *Ocampo v. Korean Air Lines*, 1994 WL 731569 (D.D.C. Sept. 16, 1994), *aff'd and rev'd in part sub nom. Oldham v. Korean Air Lines*, ___ F.3d ___, 1997 WL 582898 (D.C. Cir. Sept. 23, 1997); *Maikovich v. Korean Air Lines*, No. 83-3792 (D.D.C. Nov. 14, 1994) (Memorandum Opinion and

district court based its decision on the notion that these types of nonpecuniary damages are recoverable under Article 17 of the Warsaw Convention as "damage sustained." *Id.*

2. The Court's Decision in *Zicherman v. Korean Air Lines*

While these cases were pending and awaiting damage trials in the district court, the Court decided *Zicherman v. Korean Air Lines*, 116 S. Ct. 629 (1996)[3] and rejected the notion that any type of damages are recoverable directly under the Warsaw Convention as "damage sustained." *Zicherman*, 116 S. Ct. at 632-636. The Court explained that "damage sustained" in Article 17 of the Convention refers to "legally cognizable harm" and that courts are to determine "legally cognizable harm" *only* by reference to the applicable domestic law under the forum's choice-of-law rules, pursuant to Article 24 of the Convention. *Id.* In *Zicherman*, as in these cases, the applicable domestic law is DOHSA. *Id.* at 635-36.

The Court in *Zicherman* also rejected the rationale and holding of the Court of Appeals for the Second Circuit (from which the *Zicherman* case emanated) that general maritime/federal common law is the proper domestic law to consider. *Id.* The Court explained that Article 17 of the Convention is merely a "pass-through" provision that does not permit federal courts "to develop some common-law rule—under cover of general admiralty law or otherwise—that will supersede the normal federal disposition" absent the Convention. *Id.* at 636. Thus, federal courts are authorized only "to apply the law that would govern in absence of the Warsaw Convention." *Id.*

Order), *aff'd and rev'd in part sub nom. Oldham v. Korean Air Lines*, ___ F.3d ___, 1997 WL 582898 (D.C. Cir. Sept. 23, 1997).

[3] The damage trials had been stayed by the district court pending the Court's decision in *Zicherman*.

The governing law in *Zicherman* was DOHSA, which permits recovery of pecuniary damages only. *Id.*; 46 U.S.C. App. § 762 (A 22a). The Court stated that, where DOHSA applies, neither state law nor general maritime law can provide a basis for the recovery of nonpecuniary damages for loss of society (the only question before the Court). *Id.* at 636. The Court, therefore, concluded that nonpecuniary damages for loss of society were unavailable. *Id.* at 636-37; 46 U.S.C. App. § 762 (A 22a). The Court, however, noted that it did not consider "whether § 762 [of DOHSA] contradicts the District Court's allowance of pain and suffering damages," as the question was not before the Court. *Id.* at 636, n.4.

3. The Post-*Zicherman* Decision of the District Court

Following the Court's decision in *Zicherman*, KAL moved the district court to dismiss all claims for nonpecuniary damages in those cases still awaiting damage trials. KAL argued that the holding and rationale of the Court in *Zicherman* precludes the recovery of all nonpecuniary damages, including pre-death pain and suffering damages. Petitioners argued that pre-death pain and suffering damages were recoverable pursuant to a general maritime law survival action or under Korean law, pursuant to § 764 of DOHSA.[4]

The district court granted KAL's motion and dismissed all claims for nonpecuniary damages, finding that in light of *Zicherman*, nonpecuniary damages no longer are recoverable in these cases. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 935 F. Supp. 10 (D.D.C. 1996) (RA 1a). The district court, following the teaching of *Zicherman*, conducted a choice of law analysis and concluded that DOHSA supplies the applicable substantive United States damage law. *Id.* at 12-14 (RA 4a-7a). Next, the district court concluded that the rationale of *Zicherman* precludes the award of nonpecuniary

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[4] Petitioners also argued that nonpecuniary damages for survivor's grief were recoverable pursuant to Korean law.

damages for pre-death pain and suffering. *Id.* at 14 (RA 7a-10a). The district court held in this regard:

> [I]t appears to this Court that with *Zicherman*, the Supreme Court has held that DOHSA provides the exclusive remedy for damages which cannot be supplemented with general maritime principles. . . . Therefore, in light of the Supreme Court's decision in *Zicherman*, this Court finds that non-pecuniary pain and suffering damages may not supplement the damages available under DOHSA.

935 F. Supp. at 15 (RA 10a).[5]

Petitioners appealed this decision, pursuant to 28 U.S.C. § 1292(b), to the Court of Appeals.

C. The Decision of the Court of Appeals

On July 11, 1997, the Court of Appeals affirmed the decision of the district court. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 117 F.3d 1477 (D.C. Cir. 1997) (A 1a). The Court of Appeals, following the decisions in *Zicherman* and *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), held that nonpecuniary damages for pre-death pain and suffering may not be recovered for a death on the high seas. 117 F.3d at 1481-83 (A 8a-14a). The Court of Appeals rejected Petitioners' reliance on several pre-*Zicherman* decisions, allowing DOHSA to be supplemented with nonpecuniary damages for pre-death pain and suffering under general maritime law and adopted the post-*Zicherman* conclusion of the Ninth Circuit in *Saavedra v. Korean Air Lines*, 93 F.3d 547, 549-51 (9th Cir.), *cert. denied*, 117 S. Ct. 584 (1996). The Court below reasoned:

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[5] The district court found Petitioners' argument that nonpecuniary damages for pre-death pain and suffering are recoverable under Korean law to be "irrelevant", because the court had determined that United States law governed the question of recoverable damage. *Id.* at 14, n.2 (RA 8a).

> Three courts of appeals have dealt with the availability of a general maritime law survival action for deaths on the high seas. The First and Fifth Circuits have permitted general maritime law survival actions in cases in which the Death on the High Seas Act also applies. *See Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 893-94 (5th Cir. 1984); *Barbe*, 507 F.2d at 799-800. The Ninth Circuit reached the opposite conclusion. *See Saavedra v. Korean Air Lines Co.*, 93 F.3d 547, 553-54 (9th Cir. 1996). We believe the Ninth Circuit got it right.
>
> Assume general maritime law provides a survival action in some cases (we do not decide whether it does). Still, the effect of the Supreme Court's decision in *Higginbotham* must be evaluated. Nonpecuniary damages may be recovered under general maritime law, but not, the Court held, when the death is on the high seas. Then the Death on the High Seas Act controls and the judiciary may not evaluate the policy arguments in favor of, or against, allowing nonpecuniary damages. "Congress has struck the balance for us. It has limited survivors to recovery of their pecuniary losses." *Higginbotham*, 436 U.S. at 623. 98 S. Ct. at 2014. "The Death on the High Seas Act . . . announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages." *Id.* at 625, 98 S. Ct. at 2015. *Moragne* developed general maritime law in a space Congress had not occupied. But "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries." *Id.*

> *Higginbotham* thus instructs the lower federal courts not to extend the general maritime law to areas in which Congress has already legislated. For deaths on the high seas, Congress decided who may sue and for what. Judge-made general maritime law may not override such congressional judgments, however ancient those judgments may happen to be. Congress made the law and it is up to Congress to change it.

117 F.3d at 1481 (A 8a-9a) (footnoted omitted).[6]

ARGUMENT

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT WHICH EXISTS IN THE DECISIONS OF THE CIRCUIT COURTS OF APPEALS

Respondent KAL has no reasonable basis for opposing certiorari because, following the filing of the Petition, the Court of Appeals for the Eleventh Circuit rendered a decision which is in direct conflict with the decisions of the Court of Appeals below and the Ninth Circuit in *Saavedra* as to whether DOHSA may be supplemented with nonpecuniary damages for pre-death pain and suffering under general maritime law. *See Gray v. Lockheed Aeronautical Systems Co.*, 125 F.3d 1371, 1381-84 (11th Cir. 1997).

The question presented for review is identical to the question previously presented for review in the Petition for Writ of Certiorari filed in *Saavedra v. Korean Air Lines*, No. 96-623, which the Court denied on December 9, 1996. *See Saavedra v. Korean Air Lines*, 117 S. Ct. 584 (1996). Denial of the Petition in *Saavedra* was appropriate because, at that time, the post-*Zicherman* courts that had addressed the

[6] The Court of Appeals also rejected Petitioners' reliance on the law of South Korea as a basis for the recovery of pre-death pain and suffering damages. 117 F.3d at 1483-85 (A 14a-18a).

recoverability of nonpecuniary pre-death pain and suffering damages, save one[7], had concluded that the rationale of *Zicherman* foreclosed recovery of *all* nonpecuniary damages, including pre-death pain and suffering damages, in an action governed by DOHSA. *See Saavedra*, 93 F.3d at 550-54; *see also Bickel v. Korean Air Lines*, 83 F.3d 127, 132 (6th Cir.), *amended on reh'g*, 96 F.3d 151, 156-58 (6th Cir. 1996) (Batchelder, J., dissenting), *cert. denied*, 117 S. Ct. 770 (1997). As explained by the Ninth Circuit in *Saavedra*:

> [T]he Supreme Court's reasoning in *Zicherman*, although directly dealing only with a claim for loss of society, effectively forecloses any claims under American law for nonpecuniary damages, including compensation for the grief of the survivors, and the pre-death pain and suffering of the victims.
>
> * * *
>
> The Supreme Court, in holding that DOHSA cannot be supplemented by general maritime law in order to obtain loss of society damages, gave no indication that there was any material difference between loss of society damages and any other nonpecuniary damages, all of which DOHSA expressly disallows. Nor can we find any basis for such a distinction.

Saavedra, 93 F.3d at 550-51, 554.

The Court of Appeals below undertook an extensive analysis of Supreme Court precedent and DOHSA and rejected the pre-*Zicherman* decisions[8] allowing DOHSA to be supplemented by a general maritime law survival remedy. 117 F.3d at 1481-83 (A 4a-14a). The Court of Appeals found that

[7] *See Beirn v. Korean Air Lines*, 25 Avi. Cas. (CCH) 17,755 (E.D.N.Y. 1996).

[8] *See Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 893 (5th Cir. 1984); *Barbe v. Drummond*, 507 F.2d 794, 799 (1st Cir. 1974).

the Ninth Circuit in *Saavedra* "got it right" and concluded that nonpecuniary damages may not be recovered under general maritime law when DOHSA applies. *Id.* In rejecting Petitioners' argument that DOHSA is a "wrongful death" statute and has no bearing on survival remedies[9], the Court below stated:

> Calling [DOHSA] a wrongful death statute does nothing more than describe the manner in which Congress restricted the beneficiary class and the recoverable damages. It does not deprive those restrictions of their significance.

Id. at 1483 (A 13a).

On October 24, 1997, following the filing of the Petition herein, the Court of Appeals for the Eleventh Circuit in *Gray v. Lockheed Aeronautical Systems Co.*, 125 F.3d 1371 (11th Cir. 1997), recognized a general maritime law survival remedy for a death on the high seas and allowed the recovery of nonpecuniary pre-death pain and suffering damages to supplement DOHSA. 125 F.3d at 1381-84. In so doing, the Court of Appeals in *Gray* specifically rejected and disagreed with the decisions of the Court below and the Ninth Circuit in *Saavedra*. 125 F.3d at 1381, 1383. Rather than follow the path laid out by the Court in *Zicherman* and *Higginbotham*, the Court of Appeals in *Gray* embarked upon the incorrect path charted by the pre-*Zicherman* courts in *Azzopardi* and *Barbe*. As matters now stand, therefore, the D.C. and the Ninth Circuits do *not* allow DOHSA to be supplemented with nonpecuniary damages for pre-death pain and suffering under any theory, but the Eleventh Circuit now allows DOHSA to be supplemented with such nonpecuniary damages.[10] There is no

[9] This argument forms the basis of the pre-*Zicherman* decisions allowing DOHSA to be supplemented with nonpecuniary pre-death pain and suffering damages under general maritime law. *Azzopardi*, 742 F.2d at 893-94; *Barbe*, 507 F.2d at 799-800.

[10] The Courts of Appeals for the Fifth (*Azzopardi*) and First (*Barbe*) Circuits have not addressed the issue post-*Zicherman*. Similarly, the

rational or logical manner in which to reconcile the conflicting results between the decision of the Court below and the decision in *Gray*.

The question whether the DOHSA remedy may be supplemented with nonpecuniary pre-death pain and suffering damages is important and worthy of review by the Court. Review at this time will provide valuable and needed guidance to the lower courts which now face this important question of federal maritime law in each action governed by DOHSA. A decision by the Court will be relevant not only to this litigation, but to all actions governed by DOHSA, whether arising from an aviation disaster (*e.g.*, TWA flight 800) or from a private aircraft, helicopter, cruise ship, swimming, boating or jet ski accident occurring on the high seas and resulting in the death of a person.

KAL respectfully submits that the decision of the Court of Appeals below is correct in all respects. However, certiorari should be granted to resolve the conflict which now exists in the Courts of Appeals, as well as in the district courts[11], as to the recoverability of nonpecuniary damages for pre-death pain and suffering in an action governed by DOHSA.

Court of Appeals for the Third Circuit, which held that the DOHSA remedy may be supplemented by pre-death pain and suffering damages under a state survival statute, has not addressed the issue post-*Zicherman*. *See Dugas v. National Aircraft Corp.*, 438 F.2d 1386, 1388-92 (3d Cir. 1971).

[11] Compare *Beirn v. Korean Air Lines*, 25 Avi. Cas. (CCH) 17,755, 17,761 (E.D.N.Y. 1996) (recovery allowed), with *Tandon v. United Air Lines*, 968 F. Supp. 940, 942 (S.D.N.Y. 1997) (recovery disallowed).

CONCLUSION

The Petition for Writ Certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Dated: November 20, 1997

Respectfully submitted,

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APPENDIX

INDEX TO APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL Docket No. 565
MISC. NO. 83-0345

83-2793 DOOLEY
83-2940 SAAVEDRA
84-0331 BOYAR
84-0332 BOYAR
84-1710 CUNNINGHAM

Filed June 4, 1996

IN RE KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1983,

MEMORANDUM OPINION AND ORDER

On September 1, 1983, Korean Air Lines ("KAL") flight KE007 was shot down by a Soviet military aircraft, after it had veered off its course into Soviet airspace, killing all 269 passengers. The liability of KAL for those deaths was determined in a multidistrict litigation action in the District Court for the District of Columbia.[1] In that action, a jury found that KAL's "willful misconduct" proximately caused the passen-

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[1] An extensive discussion of the facts of this case may be found in *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991).

gers deaths, thus allowing recovery beyond the Warsaw Convention's $75,000 cap on damages. *See* Warsaw Convention, Art. 25, 49 Stat. 3020; Order of Civil Aeronautics Board Approving Increases in Liability Limitations of Warsaw Convention and Hague Protocol, *reprinted in note following* 49 U.S.C. App. § 1502 (1988 ed.). Following appeals of this action, the individual compensatory damages trials were remanded by the Judicial Panel on Multidistrict Litigation to the original transferor courts. Several actions regarding the recoverable compensatory damages still remain before this Court.

Presently before the Court is Defendant KAL's Motion to Dismiss Claims for Nonpecuniary Damages. Defendant argues that damages for loss of society, survivor's mental grief, and for predeath pain and suffering of a decedent are not recoverable. The parties agree that Plaintiffs' claims for loss of society damages must be eliminated in light of *Zicherman v. Korean Air Lines Co., Ltd.*, ___ U.S. ___, 116 S. Ct. 629 (1996). KAL's Motion raises two issues: (1) whether claims for mental grief, recoverable under Korean law, may be pursued in this Court after a choice of law analysis, and (2) whether survival damages for pre-death pain and suffering may supplement the wrongful death damages available under the Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. § 761 *et seq.*

I. Discussion

Article 17 of the Warsaw Convention makes an airline liable for "damages sustained" in the event of the death of a passenger, it provides:

> The carrier shall be liable for *damages sustained* in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 301 (emphasis added).

Until the Supreme Court's decision in *Zicherman*, ___ U.S. ___, 116 S. Ct. at 629, various courts struggled with the question of which "damages" are available under the Warsaw Convention. *See, e.g., In re Korean Air Lines*, 932 F.2d. at 1475 (D.C. Cir. 1991); *In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267 (2nd Cir.), *cert. denied, sub nom. Rein v. Pan American World Airways, Inc.*, 502 U.S. 920 (1991). With *Zicherman* the Court put some of this confusion to rest, holding that "damage" means only "legally cognizable harm" and that "Article 17 leaves it to the adjudicating courts to specify what harm is cognizable." 116 S. Ct. at 633. The Court found support for its interpretation of "damage" in Article 17 through the express limitations of Article 24 of the Warsaw Convention which provides:

> (1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, *without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.*

49 Stat. 3020 (emphasis added). Under the Court's interpretation of Article 24(2) when an "action is brought under Article 17, the law of the Convention does not affect the substantive questions of who may bring suit and what they may be compensated for." *Zicherman*, 116 S Ct. at 634. The Court concluded that "Articles 17 and 24(2) of the Warsaw Convention permit compensation only for legally cognizable harm, but leave the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice of law rules." *Id.* at 637.

A. Choice of Law

Having concluded that compensable harm is determined by domestic law, the *Zicherman* Court explained that its next logical step would be to determine which sovereign's domestic law applied. The Court did not conduct a choice of law analysis because the parties had previously agreed that the issue of compensable harm was governed by United States law. The Court held, however, that where United States law governed, the Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. § 761 *et seq.* (1988), supplied the substantive law of damages for an aircraft crash on the high sea. *Id.* at 636.

This Court has not been spared the choice of law question regarding which sovereign's domestic law governs compensable harm. Jurisdiction in these actions is premised on the federal treaty, the Warsaw Convention, 28 U.S.C. § 1331, admiralty, 28 U.S.C. § 1333, and in part on diversity. Here the parties are diverse because the Plaintiffs are citizens of the United States and the Defendant is a foreign nation. In *Klaxon Co. v. Stentor Electric Manufacturing Co., Inc.*, 313 U.S. 487, 496 (1941), the Court held that a federal court sitting in diversity must apply the choice of law principles of the state in which it sits. Because jurisdiction in these cases is based only partly on diversity, application of the District of Columbia's choice of law rules is not necessarily required, especially in light of a potential conflict between the District of Columbia and a federal policy. In *O'Melveny & Meyers v. F.D.I.C.*, ___ U.S. ___, 114 S. Ct 2048, 2055 (1994), the Court explained that a special federal rule is justified in "limited situations where there is a 'significant conflict between some federal policy or interest and the use of state law.' "

The Court recognizes that there is "no federal general common law," *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938), but is guided by the Court of Appeals for the Sixth Circuit's determination that the Warsaw Convention's, "concrete federal policy of uniformity and certainty" would be undermined

if a state choice of law rule is applied, and therefore a special federal rule is appropriate to govern this choice of law question. *Bickel v. Bowden*, __ F.3d __, 1996 WL 203349 at *3 (6th Cir. 1996). In discussing the important federal policy of uniformity and certainty embodied by the Warsaw Convention, the Court of Appeals for the Second Circuit explained:

> The principal purposes that brought the Convention into being and presumably caused the United States to adhere to it were a desire for uniformity in the laws governing carrier liability and a need for certainty in the application of those laws. . . . Hence, the test to be applied is whether these goals of uniformity and certainty are frustrated by the availability of state causes of action for death and injuries suffered by passengers on international flights. We do not see how the existence of state law causes of action could fail to frustrate these purposes.

In re Air disaster at Lockerbie, Scotland, 928 F.2d. 1267, 1275 (2nd Cir. 1991). Application of the United States' various choice of law rules could have a deleterious effect on consistent determinations of the applicable rules regarding damages under the Warsaw Convention. Thus, this Court is convinced that a federal choice of law rule is necessary here.

In the absence of any established body of federal choice of law rules, courts have looked to the Restatement (Second) of Conflict of Laws (1969) (hereinafter "Restatements") as "a source of general choice of law principles and an appropriate starting point for applying federal common law in this area." *See Bickel*, at * 3; *Harris v. Polskie Line Lotnicze*, 820 F.2d. 1000, 1003 (9th Cir. 1987). Section 175 of the Restatements provides a choice of law rule (known as the *lex loci delicti* rule) for a wrongful death action and creates a presumption in favor of law of the location where the injury occurred:

> In an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Restatements, § 175. The *lex loci delicti* rule in § 175 is difficult to apply in these cases because "it is not clear whether KE007 was shot down in Soviet airspace, over Japanese territory or in international waters." *In re Korean Air Lines*, 932 F.2d. at 1497 (Mikva, J. dissenting). Additionally, the Sixth Circuit recognized that assuming that the former U.S.S.R. was the place the injury occurred, "the U.S.S.R. is ceased to exist . . . [and therefore] no longer has a judicially cognizable interest in these matters." Furthermore, the parties have limited their choice of law arguments to whether the United States or the law of Korea applies, and the Court finds that these countries should be the focus of the choice of law determination.

"In lieu of the *lex loci* rule, § 6 of the Restatements endorses a "most significant relationship" or "center of gravity" test, which requires consideration of several factors to determine which state has a more significant interest in having their law applied. "The governmental interest approach seeks to identify which jurisdictions may have an actual interest in having their substantive law apply to a particular controversy. . . ." *See In re Korean Air Lines*, 932 F.2d at 1497 (Mikva, J. dissenting). The relevant factors of § 6 include:

> (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states and the relative interest of those states in the determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability, and uniformity of result; and

> (g) ease in the determination and application of the law to be applied.

When considering the contacts of the two countries the Court notes that South Korea is KAL's place of incorporation, its principal place of business, and the place where its crews are trained. On the other hand, the United States is the place of embarkation for many of the passengers, where the flight originated, and where all of the tickets were purchased.

Though both the United States and South Korea have significant contacts, consideration of the factors in § 6 convinces this Court that the United States law should govern these cases. The Court agrees with the analysis of the Sixth Circuit that "application of United States law supports 'ease in the determination and application of the law applied' " and " 'the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,' " weigh heavily in the favor of this United States." *Bickel*, at * 4. Indeed, "certainty, predictability, and uniformity of result" would be supported because the Supreme Court has already applied the United States law when determining compensatory damages. *See Zicherman*, 116 S. Ct. at 629; *In re Korean Air*, 932 F.2d at 1475.

Furthermore, this Court agrees that because "these actions arise under the Warsaw Convention, neither nation can legitimately claim to offer greater protection of the 'the basic policies underlying the particular field of law,' or 'the needs of the interstate and international system.' " *Bickel*, at *4. Accordingly, the Court finds that the United States law is the most appropriate when determining the available compensatory damages for these actions.

B. Loss of Society and Survivor's Grief

In light of the Supreme Court's decision in *Zicherman*, that DOHSA, supplies the substantive United States law regarding damages and that loss of society damages are not available under DOHSA this Court concludes that survivor's grief dam-

ages are also unavailable.[2] The *Zicherman* Court held that under § 762 of DOHSA recovery in a suit for death under § 761 "shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefits the suit is brought." 46 U.S.C. App. § 762. Following the dictates of DOHSA, the Court concluded that loss-of-society damages, since they are not pecuniary, may not be recovered.

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[2] Because this Court has determined that United States law governs the damages issues in this action and that DOHSA applies, Plaintiffs' argument that mental grief damages are available because Korean law permits claims for such damages is irrelevant.

Additionally, the Court rejects Plaintiffs' assertion that sections 1 and 4 of DOHSA are cumulative. 46 U.S.C. App. §§ 761, 764. Following Plaintiffs' interpretation of DOHSA, they are entitled to recover all pecuniary damages allowed by virtue of § 1 of DOHSA and in addition any damages allowed by Korean law pursuant to § 4. The Court finds that sections 1 and 4 are mutually exclusive rather than cumulative. *See In re Air Crash Near Bombay, India on Jan. 1, 1978*, 531 F. Supp. 1175 (W.D. Wash. 1982); *Bergeron v. Koninklijke Luchtvaart Maatschappij N.V.*, 188 F. Supp. 594 (S.D.N.Y. 1960). Section 1 of DOHSA provides:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Colombia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

46 U.S C. App. § 761. Section 4 provides:

> Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States . . . .

42 U.S C. App. § 764. The Court finds that while § 4 permits a cause of action based upon foreign law to be brought in admiralty in federal court, it only applies when foreign law applies pursuant to a choice of law analysis. In this case, it has been determined that United States law governs therefore the Court finds that § 4 is inapplicable and that only § 1 governs damages.

Damages for a survivor's grief are a non-pecuniary form of damages which represents compensation for an emotional response to wrongful death. *Sea-Land Serv., Inc. v. Gaudet*, 414 U.S. 573, 585 n.17 (1974). The Supreme Court has previously recognized that although federal maritime law permits dependent survivors to recover loss of society damages, it precludes survivors from recovering additional damages for their grief or mental injury. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 622 (1978). Having concluded in *Zicherman* that DOHSA precludes recovery for the nonpecuniary damages such as loss of society, survivor's grief should be similarly unavailable. The court agrees with the Sixth Circuit that there is no "distinction of which the *Zicherman* Court would have approved that would permit us to conclude that the recovery of one sort of non-pecuniary damages, such as loss of society, is precluded by DOHSA, whereas other sorts of non-pecuniary damages, such as survivor's grief, are not." *Bickel*, at *5.

C. Survival Actions for Pre-Death Pain and Suffering

Plaintiffs also argue that DOHSA limits recovery for only wrongful death claims and does not preclude additional recovery for pre-death pain and suffering because it is a survival claim.[3] There is no dispute that recovery for the decedents' alleged pre-death pain and suffering is not recoverable under DOHSA.[4] Rather, Plaintiffs argue that their survival claims are distinct from wrongful death claims and are available under general maritime law and can supplement the damages recoverable under DOHSA.

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[3] "A wrongful death cause of action belongs to the decedent's dependents. . . . A survival action, in contrast, belongs to the estate of the deceased (although it is usually brought by the deceased's relatives acting in a representative capacity) and allows recovery for the injury to the deceased from the action causing death." *Calhoun v. Yamaha Motor Corp., U.S.A.*, 40 F.3d 622 (3d Cir. 1994); *aff'd* __ U.S. __, 116 S. Ct. 619 (1996).

[4] DOHSA is a wrongful death statute that restricts recoverable to the "pecuniary loss sustained." 46 U.S.C. App. § 762.

This Court disagrees. Although, other courts have allowed a pain and suffering claim to supplement the awards recoverable under DOHSA, it appears to this Court that with *Zicherman*, the Supreme Court has held that DOHSA provides the exclusive remedy for damages which cannot be supplemented with general maritime principles.[5] The Court explained where DOHSA applies neither state law, nor general maritime law, can provide a basis for recovery of loss-of-society damages." *Zicherman*, 116 S. Ct. at 636 (citations omitted): *See also Higginbotham*, 436 U.S. at 618 (federal maritime law is not available to supplement DOHSA because with DOHSA congress specifically spoke to the issue of damages and provided damages only for pecuniary losses, the Court may not provide supplementary damages beyond that authorized by Congress). Therefore, in light of the Supreme Court's decision in *Zicherman*, this Court finds that the non-pecuniary pain and suffering damages may not supplement the damages available under DOHSA.

II. Conclusion

For the foregoing reasons, it is by the Court this 4th day of June, 1996,

ORDERED, that Defendant's Motion to Dismiss All Claims for Non-Pecuniary Damages be and hereby is GRANTED; and it is

FURTHER ORDERED, that Plaintiff's claims for loss of society damages, mental anguish and grief, and pre-death pain and suffering be and hereby are DISMISSED with prejudice.

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
United States District Judge

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5 In cases decided prior to *Zicherman*, several courts used general maritime survival principles to supplement the pecuniary damages available under DOHSA, with pain and suffering damages. *See e.g., Barbe v. Drummond*, 507 F.2d 795, 800 (5th Cir 1974); *McAleer v. Smith*, 791 F. Supp. 923, 926 (D.R.I. 1992).

ORDER

Upon consideration of the Joint Motion for an Order Amending Order of June 4, 1996 to Include Statutory Language From 28 U.S.C. 1292(b) to Certify the Court's Order of June 4, 1996 for an Interlocutory Appeal and a Joint Motion for a Stay, it is by the Court this 1st day of July, 1996,

ORDERED, that the above-captioned actions be and hereby are STAYED until further Order of the Court; and it is

FURTHER ORDERED, that the Joint Motion for certification of this Court's Order of June 4, 1996 to the Court of Appeal for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), be and hereby is GRANTED; and it is

FURTHER ORDERED, that this Court's Order of June 4, 1996 be and hereby is amended to state:

Certification for Interlocutory Appeal

Generally, appellate review of a trial court's decision is only appropriate upon an appeal from a final judgement in the trial court, that is, only after all the issues involved in a particular lawsuit have been finally determined. See F. James and G. Hazard, Civil Procedure § 12.4 at 657 (1985). However, in 1958 Congress created a statutory exception to the final judgment rule, codified at 28 U.S.C. § 1292(b). Section 1292(b) provides in pertinent part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. . . .

Thus, an interlocutory appeal can be properly certified only where the district court and the appellate court agree that (1) an order involves a "controlling question of law"; (2) this controlling question of law is one upon which "there is substantial ground for difference of opinion"; and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation."

The within action are governed by the Warsaw Convention, Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Star. 3000, T.S. No. 876 (1934), reprinted in note following 49 U.S.C. § 1502. The liability of Korean air for the death of all passengers on Korean Air Lines Flight KE007 has previously been established. See In re Korean Air Lines Disaster of September 1, 1983, 932 F.2d 1475 (D.C.Cir.), cert. denied 502 U.S. 994 (1991). The actions remaining in this Court assert recovery for damages and are postured following the Supreme Court's decision in Zicherman v. Korean Air Lines Co., Ltd., ___ U.S. ___, 116 S.Ct. 629 (1996), which held that the wrongful death cause of action is covered by the Death on the High Seas Act, 46 U.S.C.App. § 764 et seq. ("DOHSA"). Specifically, Plaintiffs claim a right to recover damages for mental anguish and grief pursuant to 28 U.S.C. § 764 under Korean law and that there is a general maritime survival action separate and distinct from the wrongful death action under DOHSA which may co-exist with the wrongful death action.

The Court has granted Korean Air Lines' Motion to Dismiss all claims for nonpecuniary damages holding that mental anguish and grief damages may not be recovered and that a general maritime survival action may not supplement wrongful death damages under DOHSA. The pending issues have never been addressed by the United States Court of Appeals for the District of Columbia and were not addressed in Zicherman, ___ U.S. ___, 116 S.Ct. at 629.

The parties are of the opinion that the recoverable damages issues involve controlling questions of law which are of significant importance to the remaining damages trials currently pending in this Court and that there are substantial grounds for differences of opinion. The parties are further of the opinion that an immediate appeal from this Order will materially advance the ultimate termination of the remaining litigation.

This Court agrees. During the many years that this litigation has been in this Court and in the other district courts and circuit courts across the United States questions regarding recoverable damages have repeatedly confounded the courts. Complicating the determination of available damages are circuit splits and the interplay between the Warsaw Convention, DOHSA, and general maritime law. With the Supreme Court's opinion in Zicherman, a major step was taken towards resolving the difficult question of available damages under the Warsaw Convention. Guidance from the Court of Appeals for the District of Columbia Circuit regarding: (1) the availability of mental anguish and grief damages; and (2) the availability a survival action for pain and suffering damages in light in Zicherman, will hopefully assist in terminating these action once in for all. Therefore the Court certifies this Order dismissing Plaintiffs' claims for nonpecuniary damages for an immediate interlocutory appeal.

It is FURTHER ORDERED, that above-captioned cases be and hereby are certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) because they involve controlling questions of law as to which there is substantial ground for difference of opinion and an immediate appeal therefrom may materially advance the ultimate termination of this litigation.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL Docket No. 565
CIVIL ACTION NOS.
83-2793, 83-2940, 83-2941, 83-3177, 83-3154, 83-3204, 83-3289, 83-3587, 83-3792, 83-3793, 83-3889, 83-3890, 84-0331, 84-0332, 84-0542, 84-1358, 84-1707, 84-1708, 84-1710, 84-2646, 84-2672, 84-2858, 85-2788

Filed April 8, 1993

IN RE KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1993,

MEMORANDUM OPINION

Before the Court are several pretrial motions filed by the defendant and plaintiffs in these case. They include: (1) KAL's motion requesting that Plaintiffs' damages be limited to those recoverable under the Death On the High Seas Act ("DOSHA"); (2) KAL's motion for partial summary judgment for decedents' Pre-death Pain and Suffering Claims; (3) KAL's Motion in Limine to Exclude the testimony of Experts on Pre-death Pain and Suffering; (4) KAL's Motion in Limine to Exclude any and all reference and evidence of KAL's negligence and wrongful misconduct; and (5) Plaintiffs' Motion for Prejudgment Interest.

A. Applicable Law

Defendant argues that the determination of damages in these cases should be governed exclusively by the Death on the High Seas Act (DOSHA), 46 U.S.C. § 761 *et seq*. Plaintiffs contend that since these claims are brought pursuant to the Warsaw Convention, DOSHA cannot limit the damages recoverable. This Court agrees.

As this Court stated previously, DOSHA is not the exclusive remedy in these cases. The Court has jurisdiction based concurrently on 28 U.S.C. § 1331 (Federal Question, i.e. the Warsaw Convention) and on DOSHA. To hold that the conflicting portions of DOSHA supersede those of the Convention would "render the Convention meaningless insofar as it relates to aircraft accidents which occur on the high seas more that a marine league from the shore." *See* In re Korean Air Lines Disaster of September 1, 1993 (March ___, 1992) slip. op at 7.

The Warsaw Convention allows for the recovery of all "damages sustained" and does not limit who may bring the suit as long as they can prove the loss. The Court of Appeals for the District of Columbia has held that "damages sustained" refers to actual harm experienced. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1485 (D.D.C. 1991). To the extent that this is contrary to the provision of DOSHA, the Warsaw Convention shall prevail. Accordingly, defendant's Motion is DENIED.

B. Motions Concerning Pre-death Pain and Suffering

Defendant moves for partial summary judgment of decedents' pre-death pain and suffering claims and requests that the court exclude the experts who will testify about the claims. KAL argues that the claim and all testimony in support of the claim is based on speculation and conjecture. Plaintiffs argue that there is sufficient evidence to produce a material question of fact that makes summary judgment inappropriate. Further, they contend that the experts' opinions are

based on provable facts and will assist there trier of fact in understanding the evidence or determining a fact in issue.

The Court concludes that summary judgment is not appropriate in this instance. A question of fact exists as to what took place on board the plane after the missile strike. The resolution of this matter is material to the pre-death pain and suffering claims. Therefore, the motion for partial summary judgment is DENIED. The admission of the expert testimony is an evidentiary matter that can only be properly determined during the course of the trial. To the extend that Plaintiffs can provide the evidence necessary to sustain these claims, it will be heard by the jury.

C. Reference to KAL's "Willful Misconduct"

Plaintiffs will not be allowed to make mention of KAL's negligence or "willful misconduct" during voir dire or the presentation of evidence in this case. The liability of the defendant is not at issue in these proceedings and any mention of the jury's findings would be unduly prejudicial to the defendant. However, the jury must be told how the litigation got to this point. Therefore, the parties are to stipulate to a statement concerning the events that led to the crash that may be used in the openings and closings in these cases. This statement should be submitted to the Court no later than the close of business on April 19, 1993.

D. Prejudgment Interest

Plaintiffs request that the Court award them prejudgment interest at the prime rate from the date of the incident. The defendant argues that Plaintiffs are not entitled to such interest due to their vigorous pursuit of punitive damages. KAL contends that if the Court determines that prejudgment interest is appropriate, it should be award from the date the Supreme Court denied certiorari and at the 52-week Treasury Bill rate.

The Court finds no merit in KAL's argument to preclude the awarding of prejudgment interest. Accordingly, Plaintiffs will receive prejudgment interest on their damage awards. However, a Determination of the rate of interest will be made at a later date.

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
United States District Judge

DATE: April 8, 1993